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In The

Supreme Court of the United States

October Term, 1969

No. 985

STEPHEN DENNISON,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No.

STEPHEN DENNISON,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, STEPHEN DENNISON, hereby petitions for a Writ of Certiorari to review the decision of the Court of Appeals of the State of New York, affirming the dismissal of petitioner's claim against the State of New York for false imprisonment, despite the fact that petitioner was denied notice and a hearing as required by the Due Process Clause and that this Court has already held in Baxstrom v. Herold, 383 U.S. 107, 15

L. Ed. 2d 620, 86 S. Ct. 760, that Section 384 of the Correction Law of the State of New York under which petitioner was incarcerated for more than 24 years was invalid in that it conflicted with the Constitution.

Opinions Below

The New York State Court of Claims awarded petitioner a verdict against the State of New York in the sum of $115,000, in an opinion reported at 49 Misc. 2d 933, 267 N.Y.S. 2d 920. The Appellate Division of the Supreme Court of the State of New York reversed the Court of Claims and dismissed petitioner's claim. The opinion of the Appellate Division is reported at 28 A.D. 2d 608, 280 N.Y.S. 2d 31. Thereafter, the Court of Appeals affirmed the Appellate Division (23 N.Y. 996, 298 N.Y.S. 2d 1002). A copy of the decision of the Court of Claims is annexed hereto as Appendix "A". Appendix "B" is a copy of the decision of the Appellate Division of the Supreme Court of New York. Appendix "C" is a copy of the decision of the New York State Court of Appeals. A copy of the decision of the New York State Court of Appeals on motion for reargument (reported at 25 N.Y. 2d 904, 304 N.Y.S. 2d 596) is annexed as Appendix "D".

Jurisdiction

The order sought to be reviewed was made and entered on February 20, 1969. An order denying a timely motion for reargument was made and entered on September 25, 1969. It is believed that the statutory provision which confers jurisdiction on this Court to review the order in question is 28 U.S.C. 1257 (3).

Questions Presented

1. Does a denial of equal protection which results in retaining a citizen for more than 24 years after he has paid his debt to society, give rise to a cause of action against the State for false imprisonment where the State has waived its sovereign immunity?

2. Does a denial of due process in a lunacy proceeding which results in incarcerating a person give rise to a cause of action against the State for false imprisonment where the State has waived its sovereign immunity?

3. Must a decision of this Court interpreting the Constitution be given retrospective application by the State Courts in an action for false imprisonment against the State?

4. Are the rules for determining whether retrospective application be given to decisions the same:

a) in criminal cases and in civil cases;
b) where the Court has reversed a prior decision and when the decision is one of first impression for the Court.

5. Should the financial burden resulting from the enactment of unconstitutional legislation be borne by the State that enacted that legislation or should the entire burden fall on the unfortunate shoulders of the victims of that illegal legislation?

The Facts

In 1925, when Stephen Dennison, petitioner herein, was sixteen years of age, he was apprehended after breaking into a roadside stand and stealing about five dollars worth of candy. As a result of this arrest, he was incarcerated by the State of New York for 34 years, 24 of which under a statute which has been previously declared unconstitutional by this Court.

After he was apprehended, Dennison pleaded guilty to burglary in the third degree and was given a suspended sentence. He was directed, however, to report to a certain minister every month. When he failed to report to the minister for several months as directed, he was apprehended for violation of the terms of his parole, brought to court and sentenced to an indeterminate term in the Elmira Reformatory.

While in Elmira Reformatory, the officials there decided that Dennison was deficient in mental ability and transferred him to the Institution for Male Defective Delinquents at Naponach, New York. Thereafter the officials decided to transfer him to Dannemora State Hospital.

Although the maximum penalty that the State of New York could exact from Dennison under its then existing law would have been ten years, the State of New York kept Dennison incarcerated for 34 years. Dennison was finally released on a writ of habeas corpus.

The excuse given by the State of New York for retaining Dennison beyond the expiration of his

term of imprisonment is that it had complied with § 384 of the New York State Correction Law, which was declared unconstitutional by this Court in Baxstrom v. Herold, supra.

§ 384 of New York's Correction Law required the State of New York to obtain a court order permitting them to retain Dennison after the expiration of his prison term. This court order was obtained without the knowledge of Dennison and without giving Dennison any opportunity to defend.

Under the procedure then existing, the Director of Dannemora State Hospital applied to a New York State judge for a retention order and this judge then appointed two examiners to examine Dennison. Under § 384 of New York's Correction Law, these "examiners" did not have to be psychiatrists. No notice was given to Dennison of this application on the theory that such notice might "unduly excite" him. The examiners submitted their report but Dennison was given no opportunity to submit any evidence in rebuttal.

He was not allowed to cross-examine these doctors. No one was appointed to represent his interests. Without any opposition from Dennison, the courts of New York allowed the Director of Dannemora State Hospital to retain him.

After his release from Dannemora State Hospital, Dennison brought suit against the State of New York for false imprisonment. The New York State Court of Claims awarded Dennison a judgment against the State in the sum of $115,115.00. The Appellate Division of the Supreme Court of

New York, Third Department, reversed the Court of Appeals and dismissed Dennison's claim. The New York Court of Appeals affirmed the dismissal of Dennison's claim.

Although the Court of Appeals, the highest court of the State of New York did not render an opinion initially, on a subsequent motion to amend the remittitur, the Court of Appeals stated that it considered Dennison's claim of denial of equal protection and held that the decision of the U.S. Supreme Court in Baxstrom should not be applied retrospectively.

The Constitutional Provisions Involved

Amendment XIV, § 1.

> "Or shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article III, § 1.

> "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Argument

POINT I

THE COURT SHOULD GRANT CERTIORARI SO AS TO EXPOUND ON THE DOCTRINE OF RETROACTIVITY OF DECISIONS OF THIS COURT.

Stephen Dennison was incarcerated by the State of New York for twenty-four years beyond his maximum prison term under form Section 384 of New York's Correction Law.[1]

During all of this time, petitioner was detained among criminals and degenerates of the worst sort and was on many occasions assaulted physically and sexually by his co-inmates and by the attendants at Dannemora State Hospital.

Persons who have never been convicted of a crime could be detained by New York State in hospitals operated by the Department of Mental Hygiene after they were afforded a jury trial on the issue of their sanity. Petitioner was detained for twenty-four years after the expiration of his prison term without a jury trial and without a trial itself in Dannemora State Hospital, an institution maintained by the Department of Correction.

There is a vast difference in the place where a person who has never been convicted of a crime is incarcerated for mental illness as to the place

1. A copy of Section 384 of New York's Correction Law as it existed prior to and during Petitioner's incarceration at Dannemora State Hospital is annexed to this petition as Appendix "E".

where prisoners are incarcerated for mental illness. In Baxstrom, this Court observed:

> "As striking as the dissimilarities are, we need not make any factual determination as to the nature of Dannemora; the New York State Legislature has already made that determination" (383 U.S. 113).

The freedom allowed, atmosphere and opportunity for treatment varies from institution to institution.

There is also a vast difference between obtaining a jury trial on the question of one's sanity where one has the right to cross-examine the witnesses who testify against him, and to produce evidence on his own behalf and a procedure whereby an ex-parte order is obtained without a trial or hearing of any sort. and without an opportunity to present any evidence or meet one's accusers.

Petitioner herein, Stephen Dennison, was even unaware that when his prison sentence was about to expire, the State had appointed two doctors to determine if he should be detained for the rest of his life because a judge in New York had dispensed with giving notice to Dennison on the theory that such notice might "unduly excite" him.

These differences between the procedure under which one was detained under Section 384 of New York's Correction Law and the comparative procedure under New York's Mental Hygiene Law and the place where one was retained under that section and the places where one could be retained under the Mental Hygiene Law, led this Court to declaring Section 384 of New York's Correction Law

is unconstitutional, and in particular in violation of the Equal Protection Clause of the Fourteenth Amendment. Baxstrom v. Herold, supra. The Court of Appeals of New York has acknowledged that Baxstrom determined that Section 384 of New York's Correction Law was unconstitutional, but refused to apply that decision retrospectively.

Petitioner claims that the Baxstrom decision did not change the pre-existing law. The Fourteenth Amendment was adopted just after the Civil War and has not been changed or altered since. The Baxstrom decision was merely a determination of what the law was ever since the Fourteenth Amendment was adopted. Baxstrom did not reverse any prior determination made by this Court. It just happened that this Court did not have an opportunity to consider the constitutionality of § 384 of New York's Correction Law until Baxstrom was heard.

Even if it were to be contended that Baxstrom represented something new in the law, we contend that the decision in Baxstrom must be retrospectively applied.

Initially this Court took the position that in expounding upon the law, it was merely declaring what the law was and not creating new law. Thus, it was held in Norton v. Shelby County, 118 U.S. 425, 30 L. Ed. 178, 6 S. Ct. 1121, that those decisions of this Court interpreting the Constitution, must be retrospectively applied.

Of late, the Court has handed down a few opinions which have expanded the rights of the individual who is accused by society of some

wrong-doing.

Thus, in Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, 93 A.L.R. 2d 733, this Court held that a defendant accused of a crime is entitled to be represented by counsel. In Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, it was held that evidence obtained by illegal search and seizure could not be utilized in State criminal prosecutions. In Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 695, 86 S. Ct. 1602, and Escobedo v. Illinois, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758, the Court imposed new restrictions on custodial questioning by police. These decisions are but a few examples of the areas in which the Court has expanded the rights of individuals who have been accused of wrong-doing by society.

Many law-enforcement officials could not foresee some of these decisions that have recently been announced by this Court. As a result, many defendants have been convicted under procedures later ruled to be unconstitutional. Law enforcement officials who could not envision some of the "new" restrictions on their activities portrayed a spectre of jail gates being flung open across the nation and the inmates of these institutions flooding the streets of every town and metropolis. It has therefore been argued before this Court recently that to apply all of these new decisions retrospectively would create havoc with the law enforcement procedures across the nation and result in a society which could not be capable of governing itself.

This argument has borne fruit in a number of

cases which did not involve the right of an individual to recover monetary damages, but did involve the right of an individual to obtain his freedom from the State. In those criminal cases, the Court has apparently departed from the rigid rule that all decisions must be applied retrospectively, first announced in Norton v. Shelby County, supra, and has adopted a new and more flexible formula.

In Linkletter v. Walker, 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731, the Court held that the Constitution "neither prohibits nor requires" that retrospective application be given to decisions of this Court interpreting the Constitution.

The new and more flexible formula first announced in Linkletter v. Walker, requires a balancing of the importance of the right denied to the individual against the inconvenience to the States which would result from the retrospective application of that right.

If the accused was denied an important right or one which "affected the very integrity of the fact finding process" (Johnson v. New Jersey, 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772, rehearing denied, 385 U.S. 890, 17 L. Ed. 2d 121, 87 S. Ct. 12), the scales would be weighted in favor of retroactivity of application. On the other hand, if it could be shown that the law enforcement authorities placed great reliance on the old standards or that the retrospective application of the new standards would severely affect the administration of justice, the scales would be weighted in favor of prospective application only (cf. Johnson v. New Jersey, supra; Stovall v. Denno, 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967).

The application of these standards has been proven to be quite difficult. While denial of the right to counsel prior to indictment at the time the defendant is identified by the victim of the crime does not sufficiently affect the integrity of the fact finding process so as to require that retrospective application be given to decisions requiring counsel at that stage (Stovall v. Denno, supra), the denial of the right to counsel upon sentence does affect the integrity of the fact finding process so as to require retroactive application be given decisions requiring counsel at that stage (McConnell v. Rhay, ___ U.S. ___, 21 L. Ed. 2d 2, 89 S. Ct. ___.

In a recent case, this Court held that the rule prohibiting the introduction of evidence obtained illegally but without a "trespassory search," would not be applied retroactively (Desist v. United States, 394 U.S. 244, 22 L. Ed. 2d 248, 89 S. Ct. 1030). Also see De Stefano v. Woods, 392 U.S. 631, 20 L. Ed. 2d 1308, 88 S. Ct. 2093. Cf. De Backer v. Brainard, ___ U.S. ___, 24 L. Ed. 2d 148, 90 S. Ct. ___ (Nov. 12, 1969).

If we were to apply the same standards that this Court had enunciated for those criminal cases that have come before it and attempt to balance the right denied to petitioner Stephen Dennison against the reliance of New York on the rule which purportedly did not recognize such rights, or against the problems that that State would face upon retrospective application of the Baxstrom decision, then the result would have to be in favor of applying the Baxstrom decision retrospectively.

Dennison was deprived not only of the right of a jury trial to determine if he could get his freedom at the end of his sentence, he was denied a trial itself, the right to cross-examine witnesses and to present any evidence on his own behalf. He was kept in Dannemora State Hospital, an institution for the criminally insane maintained by the New York State Department of Correction for twenty-four years, where he had much less freedom than he would have had if he were kept in one of the hospitals maintained by the Department of Mental Hygiene where persons who never had been convicted of a crime were detained. Clearly, the rights that were denied to Stephen Dennison because of the application of Section 384 of New York's Correction Law, reached the very integrity of the fact finding process. The denial of these basic rights weighed the scales heavily in favor of retroactivity of application. On the other hand, the other side of the scale was lightly weighed. Even though New York may claim to rely on a presumption of the constitutionality of Section 384 of its Correction Law, it was not until 1963 in People ex rel. Kamisaroff v. Johnston, 13 N.Y. 2d 66, 242 N.Y.S. 2d 38, that the Court of Appeals of New York erroneously determined that section to be constitutional. Until that time, the officials of New York obviously had some doubts about the constitutionality of the procedure of retaining persons after they had paid their debts to society.

At the time that Dennison was incarcerated, the judges in New York obviously had some doubts of the constitutionality of this procedure. Dennison himself was released from Dannemora on a writ of habeas corpus in 1960, when a judge in New York State decided that the procedure under which

he was retained was unconstitutional. Others like Dennison were also released by the judiciary of New York. Dr. Herold, the director of Dannemora State Hospital, testified in this case (R335) that Dennison is not the only one who was released from Dannemora State Hospital on a Court order. The argument that New York relied upon a presumption of constitutionality is belied by the very doubts expressed by New York's own judiciary at the time of and prior to Dennison's release on a writ of habeas corpus from Dannemora State Hospital.

Similarly, New York will not be greatly inconvenienced by the retrospective application of the Baxstrom decision. The administration of justice will not suffer because the State is forced to expend a few dollars to recompense Dennison for the years that were denied to him and the lifetime he could never enjoy. The taxpayers of New York will not be greatly imposed upon.

It is New York which enacted this invalid legislation and which caused the loss sustained by Dennison. The money that would be awarded to Dennison is not a fine or a penalty imposed upon the people of New York — it is merely a small measure of compensation to him for the loss that he sustained. Thus, even if the Court should apply the same standards in this civil case that it applied in determining whether those who were incarcerated should be set free, then the Baxstrom decision would have to be retrospectively applied.

On the other hand, we believe that the factors which led the Court to depart from the rule which required retrospective application be given to all

decisions previously announced in Norton v. Shelby County, supra, are not present in this civil case. We are mindful of the statement in Linkletter v. Walker, supra, that no distinction is to be drawn by the civil and criminal litigation in determining whether decisions of this Court should be retroactively applied. Nevertheless, in spite of that statement in Linkletter, we believe that the reasons for denying retroactive application which may be very strong in criminal cases, are not present in civil cases. In criminal cases, the doors of jail houses may suddenly be thrown open and all of the inmates be suddenly loosed upon society to pry their sinister trade. There is no such danger to the population in a civil case.

In a civil case, all that is involved is the recognition that a wrong has been done as a result of which a loss has been suffered. The question is:- Who should bear that loss? Should the loss be borne by the unfortunate individual, who because of means beyond his control was deprived of rights guaranteed by the Constitution, or should that loss be borne by the society that deprived him of those basic rights? On both the question of fault and the question of who is better able to bear that loss, the answer to the question is the same. It is the State of New York which caused the loss of most of Dennison's lifetime. For its fault, the State should be compelled to recompense Dennison. Furthermore, it is the State of New York which is better able to bear the loss than this poor unfortunate individual who, because of his background, has been barely able to find a job as a janitor with the aid of his attorney.

The highest Court of New York obviously erred

in refusing to apply the Baxstrom decision retrospectively. The Baxstrom decision did not make new law — it was a mere statement of the existing law. Even if the Baxstrom decision made new law, it would have to be applied retrospectively.

This is a new area of the law which should be expounded upon by the Supreme Court. The error committed in refusing to apply the Baxstrom decision retrospectively is the result of a lack of comprehension on the part of the bench and bar throughout the land, of the new flexible formula recently announced by the Court with regard to retroactivity of decisions.

POINT II

THE INCARCERATION OF PETITIONER RESULTING FROM HIS DENIAL OF CONSTITUTIONAL RIGHTS BY THE STATE OF NEW YORK GIVES RISE TO A CAUSE OF ACTION FOR DAMAGES.

As already set forth, the Baxstrom decision holds that the Statute under which Stephen Dennison was incarcerated for more than twenty-four years was unconstitutional.

Article III, § 1 of the Constitution vests the judicial power of the United States in one Supreme Court and such inferior Courts as may be established by Congress. Obviously the founding fathers, in establishing but one Supreme Court, envisioned a situation when decisions emanating from that Supreme Court would have to be followed.

In having but one Supreme Court, it was clear

that not every litigant could have his case heard by that Court. The purpose of the Supreme Court is to expound on the law of the land rather than protect individual rights.

If decisions emanating from this Court could be ignored at will by the State Courts, only those few individuals who would be fortunate enough to have their cases heard in the Supreme Court would be granted the rights enunciated by this Court while other litigants similarly situated would be deprived of those rights. It was clearly not the intention of the founding fathers to establish a system whereby rights granted by the Supreme Court could be available only to a few and denied to the majority.

The State of New York has waived its sovereign immunity to suits for false imprisonment.[2] In compliance with that waiver, petitioner herein, Stephen Dennison, commenced this action in New York State's Court of Claims.

This Court having declared that § 384 of New York's Correction Law was unconstitutional, it was the duty of New York State's Courts to apply that declaration of unconstitutionality to the judicial determination of this claim.

Since the State of New York has waived its immunity for suits of false imprisonment, it cannot

2. Section 8 of New York's Court of Claims Act provides: The state hereby waives its immunity from liability and actions and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the Supreme Court against individuals or corporations, provided the claimant complies with the limitations of this article.***

complain that the availability of rights guaranteed by the Constitution of the United States contributed to the existence of such a cause of action. The State of New York is clearly better able to share the unfortunate loss that has occurred among all of its taxpayers rather than to allow the entire burden of that loss to remain on petitioner.

The very deprivation of constitutional rights gives rise to a cause of action for damages against the State that deprived the claimant of those rights. The incarceration of petitioner for more than twenty-four years under an unconstitutional statute should subject the State of New York to liability for damages.

In giving decisions of the Supreme Court only prospective application and in refusing to give retrospective application to those decisions, the Courts of New York have in effect shortened the rule-making judicial power of the Supreme Court envisioned by the founding fathers when they drafted Article III of the Constitution. The ultimate power to determine whether a decision should be given prospective application only rather than be applied retrospectively as well must remain with the Supreme Court. Unless this Court has determined for some particular reason that one of its decisions should be applied only prospectively, the State Courts should be bound to apply the decision retrospectively as well.

New York has given petitioner a remedy to proceed against the State in the State Court of Claims. The Constitution, as interpreted by this Court in Baxstrom, has given petitioner a right. The right asserted by petitioner was given to him

by the Federal government under the United States Constitution. This constitutional right cannot be revoked by the States.

The extent of the constitutional right granted petitioner and others who were incarcerated under former Section 384 of New York's Correction Law is a matter of Federal Law, not State Law. Only the remedy is a matter of State Law.

It is not the business of New York's Courts to limit rights granted by the Constitution. The ultimate power to limit rights granted by the Constitution rests only in the Supreme Court.

If certiorari would be granted, the Supreme Court would be able to expound on the rights of State Courts to determine if decisions should be retrospectively applied.

POINT III

THE STATE OF NEW YORK DENIED PETITIONER THE DUE PROCESS OF LAW MANDATED BY THE FOURTEENTH AMENDMENT.

In retaining petitioner beyond the expiration of his maximum prison term, the State of New York not only denied him of all elements of a fair trial as mandated by the Due Process Clause of the Fourteenth Amendment, it denied him a trial itself.

To begin with, petitioner was given no notice that an application was being made to retain him. The theory utilized to deprive petitioner of the opportunity to defend himself was that this notice might "unduly excite" him. What is more, no one

on petitioner's behalf was given notice either. No one was appointed to represent petitioner's interests in this application to deprive him of his liberty after he had paid his debt to society.

Two doctors were appointed who met with petitioner. They submitted their reports but no copy was given to petitioner or anyone on his behalf. He had no knowledge whatsoever that a proceeding was being held to retain him. No trial was held and petitioner had no opportunity to cross-examine the doctors with regard to their findings or to present any evidence on his own behalf.

Indeed, had petitioner had an opportunity to cross-examine these doctors, it might have been revealed that they relied on their observations and on the record of the petitioner in arriving at their conclusions. Petitioner's record contained the results of an intelligence test administered to him shortly after his initial incarceration. The evidence in this case clearly indicated that the results of this test were erroneous in that petitioner was described as a low-grade moron when in fact he had normal intelligence. Such an error might clearly have influenced the determination of the psychiatrists that petitioner should be retained. Because of this illegal procedure, petitioner was denied the opportunity to cross-examine the "examiners", present evidence on his own behalf or to appear at any hearing wherein his liberty was to be adjudicated, and was kept incarcerated for more than twenty-four years.

Recently this Court dealt with a somewhat analagous problem in Jenkins v. McKeitter, 395 U.S. 411, 23 L. Ed.2d 404, 89 S. Ct. 1843. In

stating the opinion of this Court in the Jenkins case, Mr. Justice Marshall said:

> "We have frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process."

Similarly, in Greene v. McElroy, 360 U.S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400, where an employee of a firm engaged on government projects was suddenly denied security clearance, and at a hearing, the government presented no evidence as to the reasons for the denial of this clearance, but instead relied on secret reports which were not made available to the employee, Mr. Chief Justice Warren stated, at 360 U.S. 491:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual and the reasonableness of the action depends on fact-findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue."

Also see Willner v. Committee on Character and Fitness, 373 U.S. 96, 10 L. Ed. 2d 224, 83 S. Ct. 1175.

In this case there was a duty upon the State of New York not only to tell petitioner that an application was being made to retain him, but to appoint someone to represent him at a hearing since it was the belief of the State of New York that

petitioner at the time was incompetent. Cf. Covey v. Town of Somers, 351 U.S. 141, 100 L. Ed. 1021, 76 S. Ct. 724.

Obviously, petitioner was denied due process of law.

Although the Court of Appeals found that petitioner made this argument of denial of due process, it concluded that petitioner was not injured as a result of this denial because of his alleged failure to prove "actionable damages." In substance then, what the Court of Appeals of New York has said is that even if petitioner was to have received a fair trial as mandated by the due process clause, that trial would have resulted in a determination that petitioner was dangerous to himself or to society and that he should have been incarcerated. This position asserted by the Court of Appeals of New York is based upon the presumption that the results of a fair trial under our adversary system can be predicted or later ascertained even if that trial was never held. No trial lawyer has ever gone into a contested case fully assured of victory or defeat. Results of a contested trial cannot be predicted or ascertained at a later date if the trial is never held. Evidence which is present at one date may not be present at a later date.

The evidence which may have been available at the time the retention order was signed, was obviously unavailable when petitioner's claim against the State of New York was tried. None of the doctors who submitted reports which were utilized to retain petitioner at the end of his prison term were available when his claim against the State was tried.

As this Court observed in Coe v. Armour Fertilizer Works, 237 U.S. 413, 424, 59 L. Ed. 1027, 1032, 35 S. Ct. 625, 639:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in this particular case due process of law would have led to the same results."

Petitioner has come to the Courts of New York protesting of the fact that he was deprived of his liberty without due process of law. The State of New York has answered that due process would have led to the deprivation of the petitioner's liberty and therefore he should not be allowed to complain. The results of a fair trial cannot be ascertained at a later date. The petitioner was denied due process as mandated by the Fourteenth Amendment and was injured thereby.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted and upon granting certiorari the court should reverse the determination of New York's Court of Appeals.

Respectfully submitted,

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Appendix "A"

49 Misc.2d 933
267 N.Y.S. 2d 920

Stephen DENNISON, Claimant, v. The STATE of New York, Defendant.

Claim No. 38868.

Court of Claims of New York.

March 15, 1966.

* * *

RICHARD S. HELLER, Judge.

This is an action for false imprisonment based upon the allegedly unlawful confinement of the Claimant at Dannemora State Hospital from September 17, 1936 to December 16, 1960.

The Notice of Intention and Claim were duly filed and in view of this finding, the State's motion for dismissal based upon the alleged non-compliance with the Statute of Limitations must be denied.

[1] The illegality of the Claimant's confinement for the period indicated and the State's liability for any damages arising out of such confinement is unquestionable. As in Troutman v. State, 273 A.D. 619, 79 N.Y.S.2d 709, the Claimant was held over at Dannemora pursuant to Section 384 of the Correction Law, under color of an order which had been obtained without notice.

Even if notice had been given, the United States Supreme Court has, since the trial of this claim, held that the statutory procedure utilized by the State in continuing Claimant's confinement to be unconstitutional. Baxstrom v. Herold, 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620, decision handed down Feb. 23, 1966. The Supreme Court's decision clearly overruled People ex rel. Brown v. Johnston, 9 N.Y.2d 482, 215 N.Y.S.2d 44, 174 N.E.2d 725 and People ex rel. Kamisaroff v. Johnston, 13 N.Y.2d 66, 242 N.Y.S.2d 38, 192 N.E.2d 11 in holding (383 U.S. p. 110, 86 S. Ct. p. 762):

> "that petitioner was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York. Petitioner was further denied equal protection of the laws by his civil commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like Baxstrom, nearing the expiration of a penal sentence."

The sole question to be decided by the Court, therefore, is what, if any, compensable damage Claimant suffered as a result of his confinement. Damages, of course, would be minimal if he were, in fact, dangerously insane and a fit subject for retention at or commitment to Dannemora.

Although relatively easy to state, the issues

are extremely difficult to resolve. A considerable amount of speculation is necessarily involved in attempting to reach a satisfactory conclusion with respect to a person's potentialities or capacities. That psychiatry and psychology are not exact sciences becomes painfully clear to anyone charged with a fact finder's responsibility in cases such as that before the Court.

It is easy for laymen to simply throw up their arms when confronted with the semantic jungle of psychiatric and psychological concepts and terminology. One psychiatrist testifies that stress may give rise to certain types of psychotic disorders. Another states that stress doesn't "cause" but merely triggers or fosters the appearance of symptoms in an individual with latent psychotic tendencies or psychoses. What then do we mean by the "causes" or by "psychosis"? What appear to be different diagnoses, turn out to be semantic disputes, the existence of which are the clearest indication that in the field of psychiatry there are many hypotheses but distressingly few answers.

Ultimately a decision must be based upon which hypothesis or proposed analysis appears most reasonable in the light of a common sense appraisal of all relevant facts. To this must be added that, when we are concerned with personality traits or mental condition, almost every fact seems to be relevant to one expert or another.

On October 6, 1925, the Claimant, then sixteen years old, pled guilty to an indictment charging him with burglary, third degree, and specifying that he had broken into a roadside stand and stolen about $5.00 worth of candy. Although he was

given a suspended sentence, he violated his terms of probation by failing to report monthly to a minister in his home town, and on August 14, 1926 he was sentenced "to be confined in New York State Reformatory at Elmira, New York, until discharged by due process of law."

At Elmira, after observation and psychological testing, he was classified as a low grade moron, and on September 15, 1927 he was transferred to the Institution for Male Defective Delinquents at Napanoch. Except for a brief and unsuccessful release on parole, he was confined at Napanoch until March 3, 1936. On that date he was transferred to Dannemora State Hospital on the basis of a "Certificate of Lunacy," which certified him as insane and attributed the insanity to "constitutional defects."

Although his criminal sentence would have expired on September 17, 1936, shortly after he arrived at Dannemora, he was at that time still regarded as insane by the prison authorities and was retained at Dannemora pursuant to the Correction Law provisions discussed above. Finally Claimant's half brother, convinced by correspondence from him that Claimant was not insane, set the wheels in motion for the habeas corpus proceeding which resulted in his discharge.

Independent tests administered by three highly qualified psychologists subsequent to Claimant's discharge from Dannemora conclusively established that the Claimant possessed average intelligence and that he could not possibly have been a low grade moron at some other point in his life. In addition, it was obvious that had the Claimant

not been subjected to the deadening atmosphere of Napanoch and Dannemora for a period of more than thirty years, his performance on the tests administered would have been much better.

It was conceded by Claimant's attorney that the initial ten year criminal sentence was valid. In addition, the evidence established that during his stay at Napanoch, he exhibited psychotic tendencies and was, in fact, insane for a period of time. The Court has concluded, however, that at the time his criminal sentence expired, he had recovered from his insanity in the sense that overtly psychotic behavior had ceased.

What the Claimant might have accomplished or what status he might have achieved had he been released after ten years depended upon the cause and nature of his insanity and the extent to which he would have continued to be disabled by the same. Prior to his conviction, he was unquestionably a maladjusted youth from a broken family, the product of an atmosphere of cultural poverty. In addition, he may have appeared dull, but it was brought out at the trial that a major reason for his so appearing was a purely physical condition which caused his eyelids to droop and which was related in no way to his mental capacity.

Through a tragic error, he was classified as a low grade moron and shipped to Napanoch which, at least during Claimant's years there, was a repository for unfortunates of varying degrees of imbecility, idiocy and moronity. In People ex rel. Cirrone v. Hoffmann, 255 App. Div. 404, 407, 8 N.Y.S.2d 83, 86, the Third Department took judicial notice of the character of that institution

during Claimant's confinement there and regarded it as obvious that a person's fundamental rights would be infringed " * * * were he to be confined with mental defectives whose appearance, speech, and personal habits are abhorrent, as clearly as would be the case if he were required to live in a madhouse, or in fear of injury by untrained or unmanageable animals, if he were constantly subjected to offensive odors, or if confined for long periods to a dungeon or solitary confinement."

When the Claimant finally cracked and lost touch with reality, such as it was, he was transferred to Dannemora, which, although called a "hospital," was essentially a prison with facilities for controlling psychotic convicts. His new home may have been a slight improvement; and the record indicates that after his transfer, his condition improved markedly.

The State repeatedly called attention to the fact that the hospital records repeatedly described Claimant's behavior as paranoid, or in lay terms, that he had delusions of persecution. If a person is, in fact, being treated unjustly or unfairly, the fact that he perceives, resents and reacts to the inequity could hardly be regarded as competent and conclusive evidence of paranoia or paranoid tendencies.

From the testimony and exhibits, there emerged a picture of a man full of despair and defeat, who had been condemned by society and confined for what are ordinarily the most productive years of a person's life. For more than thirty-four years, he remained in custody—first among idiots and imbeciles and then among men living without

hope, sitting day in and day out in a big room looking at each other. He was exposed to indignities and degradation which are difficult, if not impossible, to imagine.

That despair might be reasonable under the circumstances is clear. The theft of $5.00 worth of candy precipitated a nightmare lasting for more than thirty-four years.

The conclusion is inescapable that, although the Claimant did become psychotic after several years at Napanoch, the psychosis or the appearance of psychotic symptoms was caused by the nature of his confinement. In a sense, society labeled him as sub-human, placed him in a cage with genuine sub-humans, drove him insane, and then used the insanity as an excuse for holding him indefinitely in an institution with few, if any, facilities for genuine treatment and rehabilitation of the mentally ill.

Although society may have been responsible for whatever disability resulted from Claimant's erroneous classification as a mental defective, there was no evidence that the psychological tests resulting in such classification were not administered or interpreted in accordance with the then accepted standards in the evaluation of mental capacity. The most reasonable assumption is that the tests that were used at that time were almost entirely verbal and that an individual lacking in verbal skills because of a poor educational or family background would almost inevitably tend to do poorly.

Legitimate reasons existed for the segregation

of mental defectives, and the Claimant was a victim of the inability of science to devise methods or devices for accurately measuring the traits upon which such segregation had to be based. Thus, although Claimant's rights were obviously violated by being confined at Napanoch, the guilt rests not with the State of New York, but with society in general.

The State is responsible, however, for retaining the Claimant at Dannemora, and the proof not only justifies but compels the conclusion that if the Claimant had been transferred to a civil mental hospital upon the expiration of his sentence or during the four year period commencing in 1936, his chances of leading a productive and satisfactory life would have been good. Instead, however, he was forced to spend twenty-four more years in an institution devoted not to rehabilitation or to curing personality disorders, but to controlling the unfortunates suffering from them. It is precisely this orientation toward control rather than cure which gave rise to whatever compensable damage Claimant suffered.

Statistics were presented with respect to the average wages earned by production employees during the period of Claimant's wrongful imprisonment. The objective yardstick which such statistics might appear to provide must be tempered as far as any purely economic loss is concerned by the fact that even in 1936 Claimant's adjustment to "straight" society would have been difficult. On the other hand, a purely economic approach would not reflect the years of degradation, humiliation and frustration which the Claimant experienced.

[2] The Court believes that no sum of money would be adequate to compensate the Claimant for the injuries he suffered and the scars which he obviously bears. A figure must be set, however, and the Court has concluded that the Claimant is entitled to recover from the State of New York, the sum of One Hundred Fifteen Thousand Dollars ($115,000.00).

Appendix "B"

Stephen DENNISON, Respondent-Appellant, v. STATE of New York, Appellant-Respondent. (Claim No. 38868.)

Supreme Court, Appellate Division, Third Department.
May 22, 1967

28 A.D.2d 608
280 N.Y.S.2d 31

* * *

Louis J. Lefkowitz, Atty. Gen., for appellant (Jeremiah Jochnowitz, Albany, of counsel).

Wein, Greenberg & Canale, Glens Falls, for respondent (George H. Wein, Glens Falls, of counsel).

Before GIBSON, P.J., and REYNOLDS, AULISI, STALEY and GABRIELLI, JJ.

PER CURIAM.

Appeal by the State from a judgment of the Court of Claims which awarded claimant $115,000 for unlawful imprisonment and cross-appeal by claimant on the ground of inadequacy.

Claimant having pleaded guilty to a charge of burglary, third degree, on October 6, 1925 received a suspended sentence and was placed on probation. He violated his probation and on August 14, 1926 he was sentenced to the New York State Reformatory at Elmira where he was to

remain until "discharged by due process of law." Following observation and tests at Elmira, claimant was classified as a low grade moron and on September 15, 1927 was transferred to the Institution for Male Defective Delinquents at Napanoch where he was classified as sexually perverted, dull and quarrelsome. In December, 1931 claimant was paroled and went to live with an aunt. His stay there was marred by suicide threats and arguments, and after four weeks, he was returned to Napanoch at the request of his aunt. After several years in Napanoch, claimant was considered psychotic and upon a certificate of lunacy was transferred to the Dannemora State Hospital on March 3, 1936. Claimant's criminal sentence expired in September, 1936 and pursuant to the then existing Section 384 of the Correction Law, he was committed to Dannemora State Hospital without service of notice of the petition to him on the ground that such notice "would tend to unnecessarily excite the patient."

There is no question but that the original 10-year criminal sentence was valid and that during all of those years he suffered from varying degrees of mental illness and his condition worsened to the end that in February, 1936 he was pronounced "insane" and unsuitable for further care and custody in Napanoch. Claimant's observation records reveal that some weeks following his admittance to Dannemora there was an improvement in his personality adjustment, but by the Fall of 1940, his records show a severe mental disorder, with delusions, retardation of thought, and general disorientation. This condition continued unabated until his release was secured in December, 1960 on a writ of habeas corpus. He was discharged

as unimproved with a diagnosis of "psychosis with mental deficiency, paranoid type." In May, 1961, claimant was admitted to the Hudson River State Hospital, apparently still suffering from paranoic schizophrenia. In early 1965, he was allowed to leave Hudson River on convalescent care status.

Claimant asserts, and indeed the trial court found, that the State is liable to him for false imprisonment on the authority of Troutman v. State of New York, 273 App. Div. 619, 79 N.Y.S.2d 709. There we held it improper to dismiss a claim for false imprisonment based on lack of notice to the prisoner that the application for his retention beyond the expiration of his criminal sentence had been made, without affording claimant an opportunity to prove "[w]hether he was sane during any of the period between the date of his original commitment and the date of his release" (p. 622, 79 N.Y.S.2d p. 712). A judgment recovered by claimant upon the retrial directed by this court was, however, reversed upon appeal and the claim dismissed for failure to establish actionable damage (278 App. Div. 728, 103 N.Y.S.2d 832). In the case before us, there is no contention that claimant was sane at the time of the retention order or at any time thereafter prior to his discharge and, indeed, all the evidence is to the contrary.

Claimant's proof in this case was directed at demonstrating the therapeutic and rehabilitative advantages of treatment at a civil mental hospital as opposed to the treatment he did receive at Dannemora. This was the basis for the damages assessed by the trial court (49 Misc.2d 533, 538, 267 N.Y.S.2d 920, 924). We find such proof irrele-

vant in the present case, initially at least in regard to proximate cause following the failure to give notice, for under the then existing Section 384 of the Correction Law, the court did not have authority to direct claimant's transfer to a civil mental hospital. Its only power was to approve or disapprove the application for retention at Dannemora. If notice affording due process had been given and the court had become satisfied that the prisoner was insane, as he quite evidently was, its only choice would have been to approve the application for retention at Dannemora. But in any event there is no evidence of any substance that at that time or at any time thereafter claimant's condition would have been cured or substantially improved by his transfer to a civil hospital or by his discharge and we are constrained to find conjectural merely the proof upon which the award rests.

It is to be noted that under Section 385 of the Correction Law, as it read in 1936, the Commissioner of Mental Hygiene could have directed claimant's transfer to a civil hospital. Such discretionary procedure, however, had nothing whatsoever to do with the Section 384 proceedings.

[3] In conclusion, we would emphasize claimant's theory of damage and the question of medical judgment which seems to us its necessary predicate. In his brief, claimant denies that the issue is whether or not he was insane, and asserts, rather, that the question is whether, "even if he was insane * * * he was damaged rather than helped" by commitment to Dannemora State Hospital, rather than to a hospital under the direction of the Department of Mental Hygiene. In view of the undoubted discretionary right that the appropriate

State authorities possessed to discharge, parole or transfer claimant, should either course have been advisable, the most that can be predicated on their omission to act is a contention that the State's physicians were guilty of errors of professional judgment, if claimant's medical proof be credited. Errors of that nature do not, however, cast liability upon the State. (St. George v. State of New York, 283 App. Div. 245, 127 N.Y.S.2d 147, aff'd 308 N.Y. 681, 124 N.E.2d 320; Taig v. State of New York, 19 A.D.2d 182, 241 N.Y.S.2d 495.)

Judgment reversed, on the law and the facts, and claim dismissed, without costs.

Appendix "C"

298 New York Supplement, 2d Series 23 N.Y.2d 996

1

23 N.Y.2d 996
298 N.Y.S.2d 1002

Stephen Dennison, -Appellant v. STATE of New York, Respondent

Court of Appeals of New York

Feb. 20, 1969.

Appeal from Supreme Court, Appellate Division, Third Department, 28 A.D.2d 608, 280 N.Y.S. 2d 31.

Claimant filed a claim against the State for damages for alleged false imprisonment in institutions for the criminally insane, on ground that he would have received more satisfactory treatment at a civil mental hospital.

The Court of Claims, Richard S. Heller, J., 49 Misc.2d 533, 267 N.Y.S.2d 920, entered an order which awarded claimant $115,000, and the State appealed, and the claimant cross appealed on ground of inadequacy of the damages.

The Appellate Division entered an order May 24, 1967 which reversed, on the law and the facts, the judgment in favor of the claimant and dismissed the claim. The Appellate Division held that the court under the then existing Correction Law, Consol. Laws, c. 43, § 384 did not have

authority to direct transfer of claimant to a civil mental hospital, and that there was no evidence of any substance that claimant's condition could have been cured or substantially improved by transfer to a civil hospital.

The claimant appealed to the Court of Appeals.

Louis J. Lefkowitz, Atty. Gen. (Ruth Kessler Toch, Sol. Gen., Jeremiah Jochnowitz, Albany, Princ. Atty., of counsel), for defendant-respondent.

Order affirmed, without costs.

All concur.

* * *

Appendix "D"

STEPHEN Dennison, Appellant v. State of New York, Respondent

Mo. No. 978

DECISION COURT OF APPEALS, DATED SEPTEMBER 25, 1969

Motion for reargument denied.

Motion to amend the remittitur granted, return of the remittitur requested and, when returned, it will be amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Claimant argued that his commitment in 1936 and his retention pursuant to the then existing Section 384 of the Conviction Law constituted a violation of his rights under the equal protection clause (see Baxstrom v. Herold [383 U.S. 107]), entitling him to damages for his retention in a criminal, rather than a civil hospital for the insane. The Court of Appeals considered this contention and held that claimant had no right to damages based on a retrospective application of Baxstrom v. Herold (supra). Other constitutional issues based on violation of due process raised by claimant were not determinative because the Court concluded that he sustained no actionable damages.

Appendix "E"

§ 384. Retention of insane prisoners after the expiration of their terms

When the term of a prisoner confined in Dannemora State Hospital has expired, and, in the opinion of the superintendent, such prisoner continues insane, the superintendent shall apply to a judge of a court of record to cause an examination to be made of such person, by two legally qualified examiners, other than a physician connected with such hospital, qualified as provided in the mental hygiene law. Such examiners shall be designated by the judge to whom the application is made. Such examiners, if satisfied, after a personal examination, that such prisoner is insane, shall make a certificate to such effect in the form and manner prescribed by article five of the mental hygiene law, for the commitment of insane persons to state hospitals. Such superintendent shall apply to a judge of a court of record for an order authorizing him to retain such prisoner at the Dannemora State Hospital, accompanying such application with such certificate in lunacy. Such judge, if satisfied that such prisoner continues insane, shall issue such order of retention, and such superintendent shall thereupon retain the prisoner at Dannemora State Hospital until discharged as provided by law. The certificate in lunacy and order of retention shall be kept by the superintendent in his office, and a copy thereof shall be filed in the office of the department of mental hygiene. The costs necessarily incurred in determining the question of insanity, including the fees of the medical examiners, shall be a charge upon the amount appropriated for the support and maintenance of the Dannemora State Hospital, and be paid in the same manner as are other expenses of such hospital.

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In The

Supreme Court of the United States

October Term, 1969

No. 985

STEPHEN DENNISON,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No.

STEPHEN DENNISON,

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vs.

THE STATE OF NEW YORK,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

Statement of Facts

The following memorandum is submitted in support of petitioner's application for a writ of certiorari to the Court of Appeals of the State of New York, and in reply to the brief in opposition submitted on behalf of the respondent.

Respondent's brief in opposition contains two points. We will attempt to answer these arguments seriatim.

Argument

POINT I

THERE IS NO REASON WHY THE DECISION OF THIS COURT IN BAXSTROM v. HEROLD SHOULD NOT BE RETROSPECTIVELY APPLIED.

This point has been dealt with at length in the original application for certiorari and there is little that need be added. Respondent, however, has asserted one argument which we feel is wholly without merit. It is claimed by respondent that the imposition of monetary damages because of changes brought about by a "growing and living law" will stunt the growth of the law and inhibit its life. This argument is based upon the premise that the growth in the law is brought about because the states consent to such changes. In fact, the opposite is true. The changes wrought in the law in recent years have been vigorously opposed by the states. The BAXSTROM decision itself was opposed in this Court by the State of New York. To decline to grant retroactivity to the application of the BAXSTROM decision would not result in less resistance to change in the law by the states.

POINT II

THE ARGUMENT MADE IN POINT I OF RESPONDENT'S BRIEF THAT NO SUBSTANTIAL CONSTITUTIONAL RIGHT OF PETITIONER WAS VIOLATED BECAUSE PETITIONER SUFFERED NO ACTIONABLE DAMAGES IS BASED UPON A MISAPPREHENSION OF THE DECISION OF THE COURT OF APPEALS ON THE MOTION TO AMEND THE REMITTITUR OR A MISSTATEMENT THEREOF.

In the second part of its brief, the State of New York asserts that the Constitutional issues raised by petitioner did not affect the determination of the Court of Appeals. On the motion to amend the remittitur (17a of the petition), the Court stated that it considered the Constitutional questions raised by petitioner and determined that petitioner had no right to damages "based on a retrospective application of BAXSTROM v. HEROLD."

The State attempts to make the point that the Court of Appeals should have determined this case without reaching the Constitutional issues on the theory that the wrong was committed by a judge who was an employee of a subdivision of the State rather than the State itself, and that in any event, the State is not liable for errors of its judiciary.

Had the Court of Appeals been able to decide this case without reaching the Constitutional issue, it would have done so. Indeed, the Court of Appeals itself observed in PETERS v. NEW YORK CITY HOUSING AUTHORITY, 307 N.Y. 519, 527, "It is

well settled that issues of constitutionality should not be decided before they need be."

The State of New York thus attempts to argue matters of State Law which apparently have been decided against it in the State Courts. The wrong perpetrated on petitioner in incarcerating him for more than 24 years under an unconstitutional Statute in a criminal hospital rather than a civil hospital was perpetrated by others than the judiciary of New York. In reaching the constitutional question involved, the Court of Appeals of New York has decided that the State of New York cannot avoid its liability on the theories advanced in the second point of respondent's brief. The State of New York was successful in the Court of Appeals because of the Court of Appeals' interpretation of the Constitutional issue by failing to give retrospective application to the BAXSTROM decision.

The matter raised in the second point of respondent's brief relates to matters of State law that this Court has no jurisdiction to hear.

The State of New York has obviously misapprehended the decision of the Court of Appeals on the motion to amend the remittitur. There the Court expressly stated that it "necessarily passed upon" claimant's argument that he should not have been retained under Section 384 of the Correction Law of New York which was subsequently declared unconstitutional in BAXSTROM. The Court rejected that argument only because it would not grant retrospective application to the BAXSTROM decision.

Conclusion

The petition for certiorari should be granted and the determination of the Court of Appeals of New York should be reversed.

Dated: New York, January 26, 1970.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1969

No. 985

STEPHEN DENNISON,

Petitioner,

against

THE STATE OF NEW YORK;

Respondent.

BRIEF IN OPPOSITION TO GRANTING CERTIORARI

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BRIEF IN OPPOSITION TO GRANTING CERTIORARI

Statement

The State submits this brief in opposition to petitioner Stephen Dennison's writ of *certiorari* to review the decision of the Court of Appeals of the State of New York affirming the dismissal of his claim against the State of New York for false imprisonment. The Court of Appeals originally affirmed without opinion. Petitioner moved for reargument or to amend the *remittitur*. His motion for reargument was denied and his motion to amend the *remittitur* was granted by order of the Court of Appeals dated September 25, 1969. The order of the Court of Appeals amending the *remittitur* stated that

> "Claimant argued that his commitment in 1936 and his retention pursuant to the then existing Section 384 of the Correction Law constituted a violation of his rights under the equal protection clause (see *Baxstrom*

v. *Herold* [383 U. S. 107]), entitling him to damages for his retention in a criminal, rather than a civil hospital for the insane. The Court of Appeals considered this contention and held that claimant had no right to damages based on a retrospective application of *Baxstrom* v. *Herold* (*supra*). Other constitutional issues based on violation of due process raised by claimant were not determinative because the Court concluded that he sustained no actionable damages."

Questions Involved

1. Is there to be a retroactive claim against the State for false imprisonment on account of procedure by the State in respect to retention in a mental hospital under the jurisdiction of the State Department of Correction of an individual who had been transferred to such hospital from a prison before his sentence had expired, which procedure had not been held invalid at the time, where thirty years later this Court held that a change in procedure was required to be followed?

2. Does petitioner raise a substantial constitutional question under the following circumstances:

(a) There was a factual finding by the New York Appellate Division, affirmed by the New York Court of Appeals, that claimant was not damaged by reason of his detention in a mental institution under jurisdiction of the State Correction Department after the termination of his sentence because he was insane at all times during the entire period and would have been confined to a civil mental institution, and there was no proof that he would have received better treatment in another institution than he received in the mental institution.

(b) The error, if any, was by a judicial officer and under the principle of judicial immunity no cause of action lies against the State.

(c) The judicial officer was not a State officer but a county officer and the State would not be liable in any case on the theory of *respondeat superior* for his torts.

Facts

Petitioner brought a claim against the State for damages by reason of his detention at Dannemora State Hospital, a criminal hospital under the jurisdiction of the New York State Department of Correction, after expiration of his term of imprisonment on September 25, 1936 until December 16, 1960, when he was released from that institution.

Petitioner was arrested on September 9, 1925 for breaking, entering and stealing from a roadside stand. He was represented by an attorney at his trial, pleaded guilty to the charge and was placed on probation for one year. He was ordered to report to a local minister once a month during his probation period. He refused to report 5 or 6 times and was thereafter arrested and sentenced to Elmira Reformatory until discharged by law. The sentence expired September 25, 1936.

He remained at Elmira until September 15, 1927 when he was transferred to the Institution for Male Defectives at Napanoch, New York. While at Napanoch, he was paroled on December 31, 1931 to the custody of his aunt, Mrs. Leroy Stafford at Fort Edward, New York. This parole was unsuccessful, and on January 11, 1932, his aunt wrote the Superintendent of Napanoch: "Something is wrong. Stephen made threats. I do not feel safe with him in the house. I believe this should be investigated, and if insane or demented, he should be returned." Her husband told the State Investigator for Napanoch that they did not feel safe with petitioner at large. Petitioner's aunt stated

that petitioner was unmanageable, insolent and threatened suicide.

On January 26, 1932, petitioner was presented at a staff meeting for parole violation. He admitted being insolent to his aunt and his threat to commit suicide. The entry made in the Napanoch record at that time stated: "Rather talkative and somewhat paranoid". On March 2, 1932, another note in that record showed that petitioner was "possibly a potential praecox". On September 8, 1933, Dr. Harrington of Napanoch examined petitioner and reported that his mental condition was decidedly abnormal and would likely develop into a definite psychosis. The records at Napanoch continued to show that petitioner's mental condition deteriorated.

On February 29, 1936, petitioner was pronounced insane and unsuitable for further care and custody in Napanoch. Two doctors certified to this. On March 2, 1936, a psychiatric report stated that petitioner was "confused and [he] expressed a variety of absurd and delusional ideas." The diagnosis was "a definitely psychotic condition" and transfer to a State hospital was recommended. He was transferred on March 3, 1936.

In September of 1936, an application was made to the County Court by Harold Connelly, Acting Superintendent of Dannemora State Hospital for commitment of petitioner to a mental institution. His petition alleged that Dennison was insane and he prayed that he be adjudged mentally sick and committed to Dannemora. The Court appointed two qualified examiners, Dr. F. K. Ryan and Dr. E. S. McDowell, to examine him and report his condition. Their report showed that his treatment should be continued and that personal service upon him be dispensed with because it would tend to excite him.

The County Judge, by orders dated September 25, 1936, dispensed with service on Dennison because it would unnecessarily excite him and adjudged Dennison insane and ordered him to be retained at Dannemora for continued treatment. During his stay at Dannemora, the Record shows, Dennison's condition never was cured. On December 16, 1960, he was discharged by order of a County Judge in a *habeas corpus* proceeding to the custody of his brother. The discharge note made in the institution's record showed that Dennison's condition was unimproved.

He stayed with his brother for the short period of four months and was forced to leave because he could not get along with his sister-in-law, perhaps due to his making sexual overtures to her, which the records of Hudson River State Hospital noted.

In May of 1961, after an incident that occurred at the Argyle County Home, he was duly committed by court order to an institution designated by the Commissioner of Mental Hygiene for care and treatment of the mentally ill. The institution designated was the Hudson River State Hospital. He remained there until March 24, 1965 when he was placed on convalescent status (not discharged). His diagnosis at that time was schizophrenia, paranoid type.

ARGUMENT

POINT I

Baxstrom v. _Herold_ should not be applied retrospectively to a civil cause of action which arose in 1936, thirty years before the _Baxstrom_ decision by this Court.

The New York Court of Appeals held "that claimant had no right to damages based on a retrospective application of

Baxstrom v. *Herold*" (383 U. S. 107 [1966]). The Court was correct in this position. *Baxstrom* stands for the proposition that a person detained in a mental hospital under the jurisdiction of a correctional department of government after termination of his sentence because he has been certified by prison physicians to be insane is entitled to the same review and the same procedure as to the question of his sanity as persons civilly committed.

At the time petitioner was certified in 1936 by the County Court of New York State to be committed to the criminal mental hospital, no similar case had been decided either by the Courts of New York State or by the United States Courts. The principle declared in *Baxstrom* was novel even in 1966.

Law is not an exact science nor is it static. It is continually changing. Change is essential to meet the new problems of a changing world.

In recent years, the growth of law in the field of personal rights and liberties has been tremendous. Convictions are now being set aside on grounds that were undreamed of at the time the convictions were made. We have no quarrel with this concept of a growing and living law. We, however, urge that a State should not be charged with liability for its past actions upon the basis of newly established standards, standards not even heard of or dreamed of at the time the actions occurred. The Constitution guarantees against liability based upon *ex post facto* legislation. It is equally necessary to protect from liability based upon new judicial holdings or theories enunciated long after the alleged tortious act.

This Court has held that retroactivity of its own judicial decisions is something each State must decide for itself.

In *Linkletter* v. *Walker,* 381 U. S. 618 (1965), the Court considered the question of whether *Mapp* v. *Ohio,* 367 U. S. 643 (1961) should be given retrospective application in considering a State Court conviction which became final prior to its rendition. This Court refused to so hold, saying (637):

> "We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. Nor would it add harmony to the delicate state-federal relationship of which we have spoken as part and parcel of the purpose of *Mapp.* Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." (Emphasis supplied.)

In *Johnson* v. *New Jersey,* 384 U. S. 719 (1966), this Court discussed cases in which new determinations should be applied prospectively and retroactively. As to cases in which they should be applied prospectively, it said (pp. 726-727):

> "In the past year we have twice dealt with the problem of retroactivity in connection with other constitutional rules of criminal procedure. *Linkletter* v. *Walker,* 381 U. S. 618; *Tehan* v. *Shott,* 382 U. S. 406. These cases establish the principle that in criminal litigation concerning constitutional claims, 'the Court may in the interest of justice make the rule prospective where the exigencies of the situation require such an application.' 381 U. S. at 628. These cases also delineate criteria by which such an issue may be resolved. We must look to the purpose of our new standards governing police interrogation, the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application of *Escobedo* and *Miranda.* See 381 U. S. at 636; 382 U. S. at 413.

> "In *Linkletter* we declined to apply retroactively the rule laid down in *Mapp* v. *Ohio,* 367 U. S. 643, by which evidence obtained through an unreasonable search and seizure was excluded from state criminal proceedings. In so holding, we relied in part on the fact that the rule affected evidence 'the reliability and relevancy of which is not questioned.' 381 U. S. at 639. Likewise in *Tehan* we declined to give retroactive effect to *Griffin* v. *California,* 380 U. S. 609, which forbade prosecutors and judges to comment adversely on the failure of a defendant to testify in a state criminal trial. In reaching this result, we noted that the basic purpose of the rule was to discourage courts from penalizing use of the privilege against self-incrimination. 382 U. S. at 414."

The choice between retroactivity and nonretroactivity does not turn on the constitutional guarantee involved. Declining to give a rule retroactivity is no disparagement of the constitutional guarantee considered therein.

In *Great Northern Ry. Co.* v. *Sunburst Oil and Refining Co.,* 287 U. S. 358 (1932), this Court said (364):

> "This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.
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> "We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions."

The problem was considered by the New York State Court of Appeals in *People* v. *McQueen,* 18 N. Y. 2d 337 (1966), where Judge Van Voorhis wrote (pp. 342-43):

> "The expansion of post conviction remedies, however, by such Federal and State decisions as *Jackson* v.

Denno (378 U. S. 368), *Fay* v. *Noia* (372 U. S. 391), *Townsend* v. *Sain* (372 U. S. 293), *Sanders* v. *United States* (373 U. S. 1), *Brown* v. *Allen* (344 U. S. 443) and *People* v. *Huntley* (15 N. Y. 2d 72) would render a large and increasing number of criminal convictions subject to being vacated even though the defendants had been tried and convicted in accordance with the law as it was understood and applied at the time. The past can seldom be reformed in the image of the present, and it is manifest that not every type of conviction can be set aside where the wisdom of the present does not coincide with that of the past.

* * *

"Quite evidently the Supreme Court was considering its function in establishing the law of the land in regard to such situations, and any seeming inequalities which may thereby have resulted to these particular individuals were considered to be of secondary importance."

Judge KEATING added (p. 349):

"But if every changing advance in the law means that we must wash away the past and undo all that has already been done, I am afraid that this progress which is so desirable will be seriously hampered, often with no correlative gain to be shown for the effort."

and (p. 351):

"If it is unjust to deprive the appellant, McQueen, of *Miranda's* benefits, it is at least equally unjust to deny them to those whose cases have already completed the appellate process. Yet no one has urged that we give the rule *complete* retroactivity. Any line drawn is essentially arbitrary."

In *People* v. *Howard*, 12 N. Y. 2d 65, 66 (1962), the New York State Court of Appeals said:

"As an abstract matter, there are few who would dispute the proposition that it is highly desirable that the law provide corrective process at any time for any

> substantial defect. There is, on the other hand, an unmistakable social value in putting an end to litigation at some point and there is, as well, an unmistakable social burden in affording corrective process for any defect."

The concept of not granting retroactivity to all new decisions is an ancient one.

In *Lyon* v. *Richmond*, 2 J. Ch. 51 (1817), Chancellor Kent wrote 150 years ago (p. 60):

> "And to permit a subsequent judicial decision in any one given case, on a point of law, to open or annul everything that has been done in other cases of the like kind, for years, before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of society, there is no such pernicious precedent to be found."

These decisions dramatically demonstrate that while, of course, an ever-changing society requires a changing concept of what constitutes due process, and those affected by the old concept not unnaturally protest that the new concept should always have existed and therefore reparations by way of money are due them because they did not receive the benefit of the new concept, it is not in every case that reparation is possible. In fact, to accord it in many cases would burden the corrective processes rather than improve them.

POINT II

No substantial constitutional right of petitioner was violated because petitioner suffered no actionable damages.

There is no substantial constitutional question involved here. The New York Court of Appeals in its order amend-

ing the *remittitur* said that it concluded that petitioner sustained no actionable damage. The New York Appellate Division in its opinion stated:

> "But in any event there is no evidence of any substance that at that time or at any time thereafter claimant's condition would have been cured or substantially improved by his transfer to a civil hospital or by his discharge and we are constrained to find conjectural merely the proof upon which the award rests. It is to be noted that under section 385 of the Correction Law, as it read in 1936, the Commissioner of Mental Hygiene could have directed claimant's transfer to a civil hospital. Such discretionary procedure, however, had nothing whatsoever to do with the section 384 proceedings. In conclusion, we would emphasize claimant's theory of damage and the question of medical judgment which seems to us its necessary predicate.
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> "In view of the undoubted discretionary right that the appropriate State authorities possessed to discharge, parole or transfer claimant, should either course have been advisable, the most that can be predicated on their omission to act is a contention that the State's physicians were guilty of errors of professional judgment, if claimant's medical proof be credited. Errors of that nature do not, however, cast liability upon the State. (*St. George* v. *State of New York*, 283 App. Div. 245, affd. 308 N. Y. 681; *Taig* v. *State of New York*, 19 A. D. 2d 182.)"

The factual finding made by the Appellate Division was that petitioner suffered no damage by reason of his being retained in Dannemora. If he suffered no damage by reason of his detention in Dannemora, there is no substantial Federal question involved.

Moreover, Dennison was committed to Dannemora after the termination of his sentence by order of County Judge

THOMAS CROAKE, dated September 25, 1936. If his constitutional rights were violated, they were violated as the result of that Court proceeding and for that the State of New York is not liable. The State has consented to be sued in tort only to the same extent as private individuals or corporations. New York Court of Claims Act, Section 8. Section 8 was considered by the New York Court of Appeals in *Weiss* v. *Fote*, 7 N. Y. 2d 579 (1960) where it said (pp. 586-587):

> "The plaintiffs contend that the Court of Claims Act destroyed any and all facets of governmental immunity and that numerous decisions of this court have so held. Such a reading of the statute and our cases is mistaken. In providing that 'The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations' (Court of Claims Act, § 8), the Legislature intended to put an end to the immunity of the State which derived from its status as a sovereign. In other words, it was the legislative design that, *in respect of its legal status*, the State be treated like any individual or corporation. This is far different from saying, however, that the Court of Claims Act places the State on a parity with private corporations or individuals *in respect of all of its defenses*. Neither the language of the statute nor its tenor supports such a view" (Italics by the Court).

Since individuals and corporations do not engage in governmental activity, the waiver granted does not extend to activities which are purely governmental (*Newiadony* v. *State*, 276 New York App. Div. 59 [3rd Dept., 1949]).

The rule that sovereign immunity has not been waived for purely governmental functions, especially applies to the Judiciary. There is no function of a State more governmental than the Judiciary. This is one realm that private enterprises cannot hope to penetrate.

In *Koeppe* v. *City of Hudson*, 276 New York App. Div. 443 (3rd Dept., 1950), the Court clearly stated the law with respect to liability for acts of a Judge, saying (p. 446):

> "But the question remains whether a city is liable for a lawless act committed by a city judge. In all the host of cases where false arrest and imprisonment have been charged we have discovered none where liability has been found against the State or a civil division thereof for the judicial abuse of criminal process. Invariably the liability has been personal when found. Of course this may be due to the fact that under the old doctrine of sovereign immunity, which existed until a comparatively recent date, an action was not allowed against a city for the acts of a city judge or magistrate (*Giordano* v. *City of Asbury Park*, 91 F. 2d 455). But we are inclined to the view that there are other weighty reasons to support the doctrine of immunity for a municipality which still exist.
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> "A judicial officer is not an employee in the sense that the doctrine of *respondeat superior* can be logically applied to his acts. Whether he belongs to a court of general or inferior jurisdiction he acts independently of any restraint or dictation except that found in the law. He is not subject to orders like a policeman, and he may not be discharged by the local authorities of the civil division where he may serve on an inferior court. In fact he is a part of an independent branch of government, and the exercise of his judgment as to any matter before him is untrammeled and unfettered. It would be incongruous therefore to fasten liability upon a municipality for the tort of a local judicial officer who acts wholly independent of and beyond the control of municipal authorities."

The Federal rule is no different than the State rule. See *Puett* v. *City of Detroit, etc.*, 323 F. 2d 591 (6th Cir., 1963), cert. den. 376 U. S. 957, where the Court held that there was no cause of action either against a municipal

judge and other public officers or the city resulting from a judicial decision, saying:

> "It seems clear that under the principle of judicial immunity no cause of action lies against the Municipal Judges, the Assistant Prosecuting Attorney, and the Corporation Counsel of the City of Detroit. * * *
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> "Likewise, it is settled that no cause of action under the statutes relied upon by plaintiff lies against the City of Detroit."

Thus, no cause of action arose against the State of New York by reason of the Court's action in holding Dennison after the termination of sentence.

Moreover, the retention was by a County Judge. Judge CROAK, a County Judge, is not an officer of the State. If there were a liability for his judicial actions on the theory of master and servant, the State would not be liable for these errors, but they would be the responsibility of the county. The County Judge is not a State officer; he is a local officer who is elected by voters of a part of the State.

In *Corcoran* v. *State* (30 New York A. D. 2d 991 [3rd Dept., Oct. 17, 1968], aff'd 24 N. Y. 2d 922), the Appellate Division said:

> "The claimant further contends that his request to appear before the Grand Jury was improperly denied by the District Attorney, and that his plea of guilty was coerced by the County Judge and his attorney and by reason thereof, he is entitled to damages from the State. In view of the fact that these complaints are made against the acts of a District Attorney and a County Judge, neither of whom are State officers within the meaning of the Court of Claims Act, no cause of action exists against the State. (Court of Claims Act, § 8; *Fisher* v. *State of New York*, 10 N. Y. 2d 60; *Jameison* v. *State of New York*, 7 A. D. 2d 944; *Cole* v. *State of New York*, 19 Misc. 2d 589.)"

Fisher v. *State*, 10 N. Y. 2d 60 (1961), cited in *Corcoran* held the State not liable for acts of the District Attorney who was a county officer. There the Court said (p. 61):

> "Appellant's theory that an Assistant District Attorney is a State officer collides head on with section 2 of the Public Officers Law which defines 'state officer' and 'local officer'. 'State officer' in that section is defined by listing all those who are to be considered and it does not include prosecutors. Then, in the same section, the term 'local officer' is stated to include every other officer elected by the voters of a part of the State, also every officer of a political subdivision or municipal corporation (a county is a municipal corporation, County Law, § 3) and every officer limited in the execution of his official functions to a part only of the State."

CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted,

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